



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 691 OF 2014

GABRIEL MUTUKU MBOBU.....CLAIMANT

VERSUS

INDEPENDENT COMMUNICATIONS ASSOCIATES.....RESPONDENT

JUDGMENT

Introduction

1. This claim was initially filed in the Senior Resident Magistrate’s Court at Milimani, Nairobi, as Civil Suit No. 3420 of 2010. Pursuant to High Court Miscellaneous Application No. 1105 of 2013, an order was issued by **Ougo J** on 14th March 2013, transferring the matter to this Court for hearing and determination.

2. By consent of the parties, the matter proceeded by way of written submissions.

The Claimant’s Case

3. The Claimant was employed by the Respondent in January 2005 and worked until 31st March 2010 when he resigned, having tendered one month’s notice as per the contract of employment between the parties.

4. The Claimant states that the Respondent has since refused and/or neglected to pay him his terminal dues and claims the following:

a)	Salary	arrears.....	Kshs.	332,328.00
b)	Service	earned from July 2005 to 31st March 2001.....		116,269.01
c)	Unpaid	21 ½ leave days.....		548,769.41
	Less amount	paid vide cheque dated 11.05.2010.....		<u>50,000.00</u>
	Balance.....			498,769.41

5. The Claimant also claims interest at commercial rates until payment in full as well as the costs of the case.

The Respondent's Case

6. In its Defence dated 21st June 2010, the Respondent denies that it has refused and/or neglected to pay the Claimant his terminal dues

Findings and Determination

7. The single issue for determination in this case is whether the Claimant is entitled to the terminal benefits sought. The Claimant himself states that the Respondent has admitted its indebtedness to him but has persisted in its refusal to settle the amount due and owing. In his final submissions filed on 16th October 2017, he admits having received the sum of Kshs. 332,328 in settlement of salary arrears. His outstanding claim is therefore as follows:

- a) Service earned from July 2005 to 31st March 2010Kshs. 166,269.10
- b) Unpaid 21 ½ leave days for 2009 and 2010.....50,172.40
- c) Interest on (a) and (b) @ 12% per annum.....190,467.00
- d) Costs of the claim

8. On the claim for leave pay, there is evidence on record that as at the time of leaving the Respondent's employment, the Claimant had 21 ½ days to his credit. The claim for leave pay is therefore indisputable and is allowed.

9. Regarding the claim for service pay however, the Respondent submits that since the Claimant was a contributing member of the National Social Security Fund (NSSF), then he is excluded under Section 35(6)(d) of the Employment Act, 2007. On his part, the Claimant made reference to the decision by Rika J in *Elijah Kipkoross Tonui v Ngara Opticians T/A Bright Eyes Limited [2014] eKLR* where the learned Judge explored instances in which the Court may award service pay, even where the Claimant is a member of NSSF.

10. I have looked at the decision by my brother Judge and do not find anything to suggest that the Court may ignore the exclusions provided under Section 35(6) at will. My understanding of the *ratio decidendi* in the *Elijah Kipkoross Tonui case* (supra), with which I fully agree, is that where an employer by conduct demonstrates that it does not view NSSF as a serious social security mechanism, then the same employer cannot rely on Section 35(6)(d) to deny an employee service pay. Such conduct would include failure to consistently make remittances or to update records.

11. In the case before me, the Court did not find any evidence that the Respondent did not view NSSF as a serious social security mechanism nor did the contract of employment provide for service pay. It seems to me therefore that to introduce the requirement for service pay at this stage would be to rewrite the parties' contract post separation and as held by the Court of Appeal in *National Bank of Kenya Ltd v Pipeplastic Samklit (K) Ltd & another [2001] eKLR* a court of law can only re-write a contract where coercion, fraud or undue influence have been proved. None of these negative ingredients were even alluded to and I consequently find and hold that the Claimant was not entitled to service pay.

Final Orders

12. The result of the foregoing is that judgment is entered in favour of the Claimant in the sum of Kshs. 50,172.40, being leave pay for 21 ½ days earned in 2009 and 2010. This amount will attract interest at court rates from the date of filing suit until payment in full.

13. The Claimant will have the costs of the case.

14. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Miss Wanjiru for the Claimant

Mr. Mabachi for the Respondent